

Additional Commercial Contract Types

FAR Case 2003-027

Summary of Comments from October 19, 2004 Public Meeting

- Appropriate Use
- Terms and Conditions
- Payment

Appropriate Use

- TYPES OF COMMERCIAL SERVICES SOLD TO THE GENERAL PUBLIC
 - IT software development often sold on a T&M/LH basis.
 - Be careful of using words such as “predominantly” to create a test as to whether a type of service can be procured under a T&M contract.
 - Instead of a list of specific services, consider identifying categories
 - By FSC
 - By NAICS
 - List of services may not be workable; many services sold on both FP and T&M/LH depending on particular circumstances/situation
 - Recommend that industry be allowed to offer on both fixed price and T&M basis and allow contracting officer to determine which is more advantageous to government based on offers received (NOTE: Rule should not require a D&F to issue a solicitation that invites an offer on both a T&M or FP basis; D&F to award T&M contract should be required only if the CO determines to award on T&M basis.)
 - Need further outreach to commercial sector that does not traditionally contract with the Government

Appropriate Use

- CONDITIONS FOR USE
 - Any rule should provide the CO with guidance on the type of circumstances that would support a T&M contract
 - Installation services?
 - Analysis of risk to the parties
 - SARA refers to “contracts”
 - Does SARA apply to subcontracts?
 - Commercial sector does not compete at sub-level (SARA requires competitive award of T&M/LH contracts)
 - Keep the rule at the prime level (cf. FAR 31.205-26(e) and (f))
 - ANPR language on subcontracts is ok
 - Award should be based on rates and technical approach to performing the work, not just price.

Appropriate Use

- ESTABLISHING SUITABILITY OF T&M AND LH CONTRACTS
 - D&F requires a description of market research conducted —need guidance on sources for market research
 - Refer CO to Part 7 for detailed instructions on how to perform market research. Market research requirement for this rule should focus only on establishing if T&M is a suitable contract type.
 - Since a T&M contract does not always specify an outcome, how does a contracting officer determine what is “in scope” for purposes of issuing a change order? Should issuance of modifications be discouraged?
 - Can a Fixed Price contract with prospective price redetermination serve the same purpose for many contracts that are awarded on a T&M basis?

Appropriate Use

- ESTABLISHING SUITABILITY OF T&M AND LH CONTRACTS (CONT.)
 - Language in ANPR that the D&F must establish that the requirement has been structured to minimize use of T&M and LH contracts needs to be revised to reflect the intent of Congress that CO's establish that the requirement has been structured to MAXIMIZE THE USE OF FP CONTRACTS.
 - Delete references to limiting value or length of a T&M contract or order and indicate that the structuring of the requirement has to be on basis that is suitable for the acquisition.
 - Clarify when a D&F is required for and IDIQ contract that allows for issuance of both TM and FP orders
 - Is it redundant to require a D&F on each order issued under an IDIQ contract that provides for both FP and T&M contracts?
 - Is it necessary to require the D&F be approved at a level above the CO when an IDIQ contract will only provide for T&M/LH orders?

Terms and Conditions

Inspection/Acceptance

- Correction of Defects (Complexity Issues)
- Commercial Warranty (Applicability pursuant to Uniform Commercial Code)
 - Patent vs Latent Defects
- Definitive Outcome vs Level of Effort (Handling)

Terms and Conditions

- Payments
 - 3 years after contract completion is not a commercial practice (access to records)
- Termination for the Government's Convenience
 - No Comments

Terms and Conditions

- Subcontracts
 - How would a commercial contractor know about approved accounting systems?
 - Proprietary issues related to company's subcontracts
 - Commercial Company's handling of subcontract issues
 - Subcontract Terms and Conditions not generally found in commercial contracts

Payments

- Substantiation of Vouchers – Direct Labor Hours
 - Timecard/Record Retention Times
 - Substantiation agreed to by Contracting Officer and Contractor at time of award
 - Blended rates vs actual cost

Payments

- Materials
 - “Most Favored Customer” not a current commercial practice
 - Actual Cost = Amount Shown on Invoice
 - Paid cost rule does not apply

Payments

- Subcontract Costs
 - Actual Costs
 - Similar to Firm Fixed Price lowest price competitively bid
 - Focus on qualifications of subcontractors
 - Cost Monitoring should be performed by prime contractor and CAO
 - Contract should specify technical requirements of labor

Payments

- Access to Records
 - No Additional Comments
- Oversight
 - DCAA Involvement

Payments

- Removal of Withhold Provisions
 - No Comments
- Total Cost
 - Material Handling & Subcontract Administration Costs
 - Suggestion: Fixed amount estimated in proposal
 - Other Direct Costs
 - Travel/ODC

Payments

- Ceiling Price Increase
 - Determinations – how made?
 - Statute requires ceilings
- Overpayments/Underpayments
 - No Comments
- Release of Claims
 - No Comments

Payments

- Prompt Payment
 - Interim & Final Invoices?
 - EFT Out Exceptions to Use
- Electronic Funds Transfer
 - No Additional Comments
- Discount
 - No Comments
- Cost Accounting Standards
 - Commercial companies will not comply with CAS